UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FragranceNet.com, Inc.,

Plaintiff,

CV 06 2225 (JFB) (AKT)

- against -

FragranceX.com Inc. and John Does 1-20

Defendant.

AFFIDAVIT OF DENNIS M. APFEL IN SUPPORT OF FRAGRANCENET'S MOTION FOR LEAVE TO FILE ITS THIRD AMENDED COMPLAINT

STATE OF NEW YORK)
ss:
COUNTY OF SUFFOLK)

DENNIS M. APFEL, being duly sworn, deposes and says:

1. I am the CEO of FragranceNet.com, Inc., Plaintiff in the above-captioned action and have personal knowledge of the facts set forth herein. I respectfully submit this affidavit in support of Plaintiff's motion for leave to file its Third Amended Complaint.

2. FragranceNet owns a U.S. trademark application for FRAGRANCENET, and as a result of its continuous and extensive efforts in marketing, advertising, and resultant sales, as well as its maintaining a high quality of retail service, FragranceNet has become one of the leading and most popular purveyors of fragrances on the Internet, and has acquired a reputation for high quality and customer service under its FRAGRANCENET mark. As a result, consumers recognize the FRAGRANCENET mark as identifying the retail services provided by FragranceNet.

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3. FragranceNet has discovered that defendant inserted "fragrance net" and "fragrancenet," FragranceNet's house mark and most valued asset, into the metatags of its Web site, including but not limited to the Web pages for defendant's women's fragrance page and men's fragrance page.

4. Metatags are codes in the sublevel of Web pages that are invisible to the average user. They are used to provide an Internet search engine with information about the content of a page and are used to attract Internet search engines to a Web site. Metatags provide the basis for ranking and displaying the results of a search that is conducted for a word or term contained in a metatag.

5. FragranceNet also discovered that when a search for "fragrance net" or other variations of FragranceNet's mark are conducted by Google's search engine, an advertisement for defendant's Web site, www.fragrancex.com, appears on the screen immediately proximate to the search results, accompanied by a link to defendant's Web site. That form of advertising is conducted through Google's AdWords Program and the advertisements are called "Sponsored Links."

6. The only way to have one's Sponsored Link appear on a search results screen is by having bid on a keyword that triggers the appearance of a Sponsored Link. Sponsored Links typically appear at the very top of the screen and also down the right side. Internet search providers offering Sponsored Links programs, such as the AdWords Program offered by Google, permit an advertiser to specify whether the keywords it bids on should be applied to its Web site as a "broad match," "phrase match," "exact match" or "negative match."

7. Google's "broad match" option is the default option in its AdWords program. Under a "broad match," an advertiser will appear as a Sponsored Link when a search is

conducted (*i.e.*, when the consumer types in that word) for the keyword the advertiser paid for as well as for any plural or relevant variation of that keyword. "Phrase match" permits an advertiser to bid on a phrase such as "designer fragrance." The advertiser's Sponsored Link will appear whenever a search is conducted for that phrase, even if the phrase is incorporated into or is used in combination with other words, such as "bad designer fragrance." An "exact match" will display the advertiser's Sponsored Link only when the exact word(s) is the subject of the search, not when combined with any other word(s). A "negative match" permits an advertiser to specify particular circumstances under which a match will not trigger a Sponsored Link. For example, if an advertiser bid on the keyword "designer fragrance" but did not want its Sponsored Link to appear when a consumer types in "bad designer fragrance," it could include a negative match for "bad designer fragrance." Under those circumstances, the advertiser's sponsored link will not appear when the consumer types in "bad designer fragrance."

8. Defendant has bid on certain keywords that cause its Sponsored Link to appear when a search is run for "fragrance net" or other variations of FragranceNet's mark. That is clear because defendant's Web site appears as a Sponsored Link when a consumer conducts an Internet keyword search, *i.e.*, types in, "fragrance net" or other variations of FragranceNet's mark.

9. Defendant has failed and refused to use a negative match, a well-known and commonly used mechanism, to avoid having defendant's Web site appear as a Sponsored Link when consumers conduct a search for "Fragrance Net" or other variations of Plaintiff's mark. Because Plaintiff does not sell any products under the FRAGRANCENET brand,

consumers who conduct Internet keyword searches for "fragrance net" or other variations of FragranceNet's mark can be looking only for FragranceNet's Web site.

10. Defendant's conduct has caused confusion and is likely to continue to do so. The use of FRAGRANCENET in the metatags underlying defendant's Web site to attract search engines to its Web site during an Internet search for "fragrance net" or other variations of FragranceNet's mark is likely to cause confusion among consumers and/or to deceive them into believing that defendant somehow is associated with or related to FragranceNet's retail services and/or that defendant somehow is associated with or sponsored by FragranceNet.

11. FragranceNet has been damaged as a result of defendant's unauthorized use of FRAGRANCENET in the metatags underlying its Web site and as a result of its bidding on, purchase and use of keywords in Google's Adwords program that defendant can control and which defendant knows will cause defendant to appear as a Sponsored Link when a consumer types in "fragrance net" or other variations of FragranceNet's mark. Defendant's wrongful conduct has deprived and will continue to deprive FragranceNet of opportunities for expanding its goodwill, and will continue to cause it damage.

Dennis M. Apfel

Sworn to before me this
4th day of May, 2007

Beatrice Bencivenga
Notary Public

BEATRICE [illegible]
Notary Public, State of New York
No. [illegible]
Qualified in [illegible] County
Commission Expires May 31, 2011

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that she has caused to be served via overnight mail a true and correct copy of the foregoing AFFIDAVIT OF DENNIS M. APFEL IN SUPPORT OF FRAGRANCENET'S MOTION FOR LEAVE TO FILE ITS THIRD AMENDED COMPLAINT on this 4th day of May, 2007, on the following counsel of record:

David Rabinowitz, Esq.
Moses & Singer LLP
405 Lexington Avenue
New York, New York 10174-1299

The above is the address designated by said attorneys for service.

Rebecca Myers

Rebecca K. Myers